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No. 93-1539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Western District of Louisiana

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MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the district court properly held, in accordance with well settled law, including this Court's decision in *Shaw v. Reno*, that the State of Louisiana's congressional apportionment plan, as embodied in Act 42 of the 1992 Regular Session of the Louisiana Legislature, violated the plaintiffs' rights to equal protection of the laws as guaranteed by the United States Constitution?

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MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees move this Court to affirm the judgment of the three-judge panel of the United States District Court for the Western District of Louisiana. In light of this Court's clear decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the unanimous and thorough opinion of the court below meticulously applying *Shaw*, and the egregious violation of the Equal Protection Clause established by the undisputed facts, the resolution of the question presented is manifest. The decision below is based on settled law, and the factual underpinnings of the court's holding are firmly supported and not clearly erroneous. Fed.R.Civ.P. 52(a). No further argument is required.

STATEMENT OF THE CASE

This case presents the Court with a stark, purposeful state-ordered segregation of Louisiana's citizens on the basis of race. Specifically, this case centers on Louisiana's racial gerrymander of its Congressional Districts and, in particular, District 4. Given the dictates of *Shaw*, the bizarre contours of District 4 superimposed on a map of the state of Louisiana condemn this as racially-inspired gerrymandering. Precisely as in *Shaw*, the Court is confronted with "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw*, 113 S.Ct. at 2832.

At first glance, District 4 appears more like the work of an abstract artist than the result of the considered judgment of state legislators attempting to comply with the United States Constitution. The district court set forth this telling description of District 4:

> District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles. A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, as it winds along its erratic path, District 4 projects myriad diverticulae to encapsuate small sacs of otherwise widely dispersed black voters. No one could claim that District 4 is compact, at least not with a straight face.

(J.S. App. 29).[1] In addition, "at some places along its attenuated path, District 4 is no more than 80 feet wide.

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[1] The district court offered several apt descriptions of District 4, including the following:

> Like the fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "Z" across the state, as it cuts a swath through much of Louisiana. It begins north of Shreveport—in the northwestern corner of

Such tokenism mocks the traditional criterion of contiguity." (J.S. App. 30).

After acknowledging testimony that "there is no more fundamental unit of societal organization in the history of Louisiana than the parish," (J.S. App. 30), the court below discussed District 4's effect on the parish system:

> Whereas the previous congressional plan divided only seven of modern Louisiana's 64 parishes, scattering fractions of the same parish in more than one congressional district, Act 42 splits and scatters 28. District 4 is particularly aggressive in violating the boundaries of these traditional political and governmental units of the State: of the 28 parishes touched by District 4, only four whole parishes are included; but the district annexes only shards of 24 additional parishes, usually incorporating none but the predominantly black fragments of those shattered regions. Additionally, for the first time in Louisiana history, with the advent of Act 42 a districting plan *violates the boundaries of nearly all major municipalities in the State.*

(J.S. App. 30) (emphasis added).

> Louisiana, just east of the Texas border and flush against the Arkansas border—and sweeps along east that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. This district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominatly black residential neighbors. Finally, at its southern extremity, the district extends yet another projection—this one westward towards Lafayette—adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the legislature engaged in racial gerrymandering.
>
> (J.S. App. 27-28).

The facts in this case are even more egregious than in *Shaw*. The three-judge court was not forced to rely solely on the fact that the Louisiana districting scheme was so bizzare that it could only be understood as the product of racial gerrymandering. Indeed, those responsible for the scheme testified under oath that race, and race alone, drove the line-drawing.

This case was heard by a special three-judge panel of the United States District Court of the Western District of Louisiana. Appellees, long-time citizens of Lincoln parish, Louisiana, challenged on several grounds Louisiana's established statewide districting plan for electing Louisiana's delegation to the United States House of Representatives. The Louisiana legislature enacted the challenged Congressional districting scheme subsequent to the 1990 census in Act 42 of the 1992 Regular Session ("Act 42"). Appellees filed their suit in June 1992, less than six weeks after the enactment of Act 42 and immediately upon preclearance of the plan by the United States Department of Justice.

The district court held a trial on the merits on August 26 and 27, 1992. The district court was aware that *Shaw v. Reno,* 113 S.Ct. 2816 (1993), essentially an identical case originating in North Carolina, was then under consideration by this Court. The district court therefore held this case under advisement until issuance of this Court's decision in *Shaw*.

In response to *Shaw,* the three-judge court requested supplemental briefing addressing *Shaw's* ramifications for this case. Specifically, the court focused on the issue whether Louisiana's Congressional districting scheme was the product of racial gerrymandering and, if so, whether the plan was "narrowly tailored to further a compelling government interest," as required by *Shaw*. *Shaw*, 113 S. Ct. at 2818. A second full evidentiary hearing was held on August 19 and 20, 1993, to address the issues raised by *Shaw*.

On December 28, 1993, the three-judge court issued its unanimous opinion (including a concurrence) striking down Louisiana's Congressional districting scheme and enjoining the State from conducting any future election pursuant to the plan.[2] The court held that Louisiana's entire Congressional districting plan, and District 4 in particular, "are the products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest." (J.S. App. 53) (emphasis in original). Thus, the court held, the plan violates the Equal Protection Clause; the court further ruled that the plan cannot form the basis for future elections, and will dissolve automatically by court order.

The court held as follows:

> [W]e declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; and we enjoin the State of Louisiana from holding any future congressional elections based on the Plan. We do not, however, invalidate the 1992 congressional elections held thereunder; but we do hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the Plan—and each district thus created—shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, such terms of office and such districts not to be extended or carried over into the next Congress in any manner whatsoever.

(J.S. App. 54).

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[2] The Memorandum Opinion of the three-judge court is attached as Appendix B to the Jurisdictional Statement.

ARGUMENT

Appellants' Jurisdictional Statement is riddled with mischaracterizations, omissions, and caricatures of both this Court's decision in *Shaw* and the district court's decision in this case. Appellants' reliance on such caricatures bespeaks an understandable desperation. The districting plan at issue is indefensible. It cannot withstand scrutiny under the Equal Protection Clause.

I. THE DISTRICT COURT PROPERLY APPLIED *SHAW TO THIS CASE*

The Equal Protection Clause mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its central purpose is "to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw*, 113 S.Ct. at 2824 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)). It prohibits not only express racial classifications appearing on the face of a statute, but also statutes that are facially neutral yet unexplainable, except perhaps by pretextual rationalizations, on grounds other than race. *Shaw*, 113 S.Ct. at 2825.

A. The *Shaw* Holding

In *Shaw*, this Court found the districting scheme at issue to be so bizarre on its face that it was "unexplainable on grounds other than race." *Id.* (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Putting pretextual post hoc rationalizations aside, the *Shaw* Court determined that the districting scheme was the product of a broad racial classification. The constitutional violation was not merely the odd shape of the district itself, but also what the odd-shaped district indisputably proved—namely, that race had determined the shape of the district. The evil mandating strict scrutiny, therefore, was not merely the odd shape of the district, but the racial classifications made by the legislature in creating the district.

The *Shaw* Court likened such bizarre districts to the "uncouth twenty-eight-sided" municipal boundary line challenged in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *Shaw*, 113 S.Ct. at 2823. *Gomillion* dealt with a statute that redrew the city limits of Tuskegee, Alabama. On its face, the statute was race-neutral—it contained no express racial classifications. However, the consequence of turning the city boundaries of Tuskegee from a square to a wild, unexplainable figure with twenty-eight sides was to remove from the city limits virtually all black voters and no white voters. The effect of the facially race-neutral statute, which segregated voters on the basis of race, was viewed as compelling evidence of discriminatory intent violative of the Constitution.

The majority in *Gomillion* resolved the case under the Fifteenth Amendment. *Gomillion*, 364 U.S. at 342-48. In his separate opinion, however, Justice Whittaker concluded that unlawful segregation of voters into different districts also implicated the Equal Protection Clause. *Id.* at 349 (Whittaker, J. concurring). As the *Shaw* court recognized, *Gomillion* and its progeny clearly establish that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw*, 113 S.Ct. at 2826.

B. The Problem of Proof as Discussed in *Shaw*

An issue addressed at length by *Shaw* was the difficulty of proving that facially neutral statutes are products of discriminatory intent. *Id.* at 2826-27. The Court expressly stated that "the difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Id.* at 2826.

The Court noted that despite the probem of proving discriminatory intent in the face of a facially neutral

statute, there were some instances, such as the one before it (as well as the situation in *Gomillion*), where the shape of the districts was so odd that the statute establishing them, albeit facially neutral, could fairly be understood only as an exercise in racial gerrymandering. The Court stated:

> The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race. *Gomillion*, in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. *So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.* We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Id. at 2926-27 (citations omitted; emphasis added).

Shaw thus elucidates the distinction between the constitutional violation of racial gerrymandering and proof of such a violation. Racial gerrymanders implicate the Equal Protection Clause because they represent intentional racial segregation. Bizarrely shaped voting districts that travel the length and breadth of a state and include various twists, turns, and appendages in an attempt to encircle only members of a particular racial group present compelling evidence of a racial gerrymander. Such districts are therefore an effective, but not the exclusive, way of proving racial gerrymandering.

C. The District Court's Opinion Applying *Shaw*

The district court was faced with a case virtually identical to *Shaw*, but with facts that more clearly establish that Louisiana engaged in an unabashed racial gerrymander. First, District 4 itself is so irrational on its face that it can be understood only as an attempt to segregate voters into different voting districts because of their race. (J.S. App. 11-12). Second, all of the witnesses admitted that voters were, in fact, segregated into or out of this district solely or predominantly on the basis of race. (J.S. App. 39-43). Either branch of evidence, standing alone, supports application of strict scrutiny to Louisiana's districting scheme. Both exist here.

The district court went to considerable lengths to explain the point, addressed in *Shaw*, that racial gerrymandering may be proved either by inferential or direct evidence, or both. The district court recognized that "*Shaw* primarily deals with the problem of proving racial gerrymandering *indirectly* or *inferentially*" and that *Shaw* held that racial gerrymandering could be inferred from bizarrely shaped districts that "presumptively bespeak an impermissible purpose." (J.S. App. 14-15) (emphasis in original). The district court, however, also discussed the principle that provides the implicit foundation for the logic of *Shaw*, namely, that "racial gerrymandering may —*a fortiori*—also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on race." (J.S. App. 15).

The evidence presented below led the district court to this unanimous conclusion:

> If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*. The Court recognized in *Shaw* that

> "[n]o inquiry into legislative purpose is necessary when the racial clasisfication appears on the face of the statute." The same is equally true when virtually unanimous, essentially uncontroverted *direct* trial evidence establishes racial classification, as it did here. In this case, we find overwhelming evidence—both *indirect* and *direct*—that the Plan is a product of racial gerrymandering.

(J.S. App. 15) (emphasis in original).[3]

The district court, then, properly applied the evidentiary foundations applied by *Shaw*. In relying on both inferential and direct proof of racial gerrymandering, the district court precisely applied the respective evidentiary burdens in this case. The court acknowledged *Shaw's* explicit holding that a citizen who alleges that a reapportionment scheme that is so irrational on its face that it can only be understood as an effort to segregate voters on the basis of race states an equal protection claim. (J.S. App. 22). Such an irrational district explainable on its face only as racial gerrymandering creates a presumption of unconstitutionality. The district court explained, however, that "if the state advances a legitimate, non-racial explanation for the plan's irregularity, then the factfinder must—as always—weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering." (J.S. App. 23).

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[3] The district court also went to great lengths to distinguish between the concepts of *intent* and *motive*. This distinction, of course, is between "what" the legislature did versus "why" it did it. For purposes of determining whether strict scrutiny applies, the court need only look at whether the districting scheme is an *intentional* racial gerrymandering. A state's proferred *motives* for engaging in a racial gerrymander are irrelevant to the initial determination of whether strict scrutiny under the Equal Protection Clause applies to the plan. Such motives become relevant only after the court moves on to determine whether the motives rise to the level of a "compelling state interest." *See Shaw*, 113 S.Ct. at 2830.

The district court emphasized that "Supreme Court precedent clearly indicates that plaintiffs have the ultimate burden of proving—by a preponderance of the evidence—that the irregularity of the challenged districts reflects racial gerrymandering." (J.S. App. 23-24). Thus, the district court properly placed the burden of proof of gerrymandering on the plaintiffs, "reflect[ing] a basic tenet of equal protection analysis: there can be no violation of the Equal Protection Clause unless those who complain demonstrate that the state has engaged in purposeful discrimination." (J.S. App. 24) (citations omitted). The district court concluded that the plaintiffs comfortably met their burden in this case—the Louisiana districting scheme is clearly the product of racial gerrymandering.

II. LOUISIANA'S CONGRESSIONAL DISTRICTING SCHEME IS CLEARLY A PRODUCT OF RACIAL GERRYMANDERING

Louisiana has created and admitted to one of the clearest cases of racial gerrymandering ever confronted by a federal court. First, District 4 is so bizarrely shaped as to admit no other conclusion. Second, the districting scheme flouts every traditional districting standard. Third, the direct testimony of all involved in formulating the plan incontrovertibly establishes that the plan is a racial gerrymander.

A. District 4 Is So Bizarre That It Can Only Be Understood as the Product of Racial Gerrymandering

District 4 can only be explained as a racial gerrymander. The sole conceivable purpose for creating a Congressional district with such a contorted geographic shape was to segregate voters intentionally and solely on the basis of their race. Given the overwhelming majority of voters of one race included within District 4's erratic and otherwise irrational boundaries, its bizarre shape can only

make sense if it is a racially gerrymandered district. In short, racial segregation of voters was the solitary goal in creating District 4—a goal which triggers close scrutiny under equal protection principles. As the district court noted: "This intense scrutiny is justified by the grave danger that is posed to our constitutional order and national community when a state creates and administers laws based on the race of its citizens." (J.S. App. 13-14).

On its face, therefore, District 4 fits perfectly within the holding of *Shaw*. This Court held in *Shaw* that a plaintiff states a claim under the Equal Protection Clause by alleging that a State has "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw*, 113 S.Ct. at 2832. District 4 unquestionably fits this description; therefore, plaintiffs-appellees stated a claim triggering strict scrutiny.

B. District 4 Flouts Every Traditional Districting Standard

As recognized in *Shaw*, traditional districting principles play a vital role in determining whether a districting plan is the product of racial gerrymandering. Such criteria are important not because they are constitutionally mandated, but because they are useful as an evidentairy mechanism since they are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.* at 2827. The *Shaw* court made this point forcefully:

> Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin,

> bears an uncomfortable resemblance to political apartheid.

Id.

Traditional districting principles, then, are a helpful indicator of the existence or absence of racial gerrymandering. To the extent such principles are followed, a State's contention that its districts are not the product of racial gerrymandering gains support. To the extent these principles are ignored, a plaintiff's claim that districts are racially gerrymandered is strengthened. It follows that the greater the degree of deviation from these principles by a districting scheme that encircles mainly voters of a particular race, the easier it becomes to establish a claim of racial gerrymandering.

Louisiana can hardly rely on traditional districting principles in attempting to explain in its districting scheme in non-racial terms. Here, every traditional districting principle has been ignored or flouted. The district court conducted a detailed analysis of each traditional districting principle, including compactness, contiguity, respect for established political subdivisions, and commonality of interests. Based on that painstaking analysis, the three-judge court determined that Louisiana's plan "cavalierly disregards" all of those principles. (J.S. App. 29). The court made the following findings and conclusions: (1) "No one could claim that District 4 is compact, at least not with a straight face"; (2) "at some places along its attentuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity"; (3) "In complementary fashion, District 6 maintains contiguity only by employing gossamer connections at several junctions"; (4) the plan "splits and scatters" 28 of Louisiana's heretofore nearly inviolate parishes; (5) District 4 itself fractures 24 of Louisiana's 64 parishes; (6) the plan "violates the boundaries of nearly all major

municipalities in the State; and (7) District 4, with its irregular boundaries, "subsumes bits of every religious, ethnic, economic, social, and topographical type found in Louisiana." (J.S. App. 29-31).

This case, then, falls squarely within the paradigmatic example offered in *Shaw*—where clear proof of racial gerrymandering "will not be difficult at all." *Shaw*, 113 S.Ct. at 2826. Here, the Court is faced with "a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at 2827. In short, Louisiana brings before this Court the quintessential case of racial gerrymandering.

C. Every Witness Admitted that the Districting Scheme is the Product of Racial Gerrymandering

This case presents additional evidence of racial gerrymandering beyond the bizarre shape of the district itself and its total disregard for traditional districting principles. The district court was confronted, in *two* full evidentiary hearings on the matter, with *direct* evidence and admissions that Louisiana's districting scheme is the product of racial gerrymandering.

The fortuitous timing of the hearings, in relation to the issuance of *Shaw*, makes this case unique with regard to the existence of direct proof of intentional racial gerrymandering. This is because the first hearing took place *before* this Court handed down its decision in *Shaw*. Accordingly, the witnesses testified free of temptation to skew testimony or present self-serving evidence in an effort to overcome *Shaw's* clear dictates. At the first hearing, the witnesses did not even attempt to conjure up disingenuous post hoc rationalizations. Instead, they repeatedly admitted the truth: this plan is the product of racial gerrymandering.

The examples of such testimony are numerous. Here are a few detailed by the district court:

> In response to this court's query whether the Legislature had created a racial gerrymander, Defendants' counsel—Mr. Mongrue—said, "[a]nd [racial gerrymandering]'s exactly what [the Legislature] can do . . . ." Similarly, Mr. Willie Hunter, a black state legislator and a fact witness for the Defendants, testified that the Legislature's *intention* "was to create a district where there was an excellent possibility of having another black elected . . . , and that to accomplish this they [the legislators] looked at numbers [of black voters] period." Professor Engstrom, and expert witness for the defense, stated unabashedly that "race drove . . . [the creation of] . . . the Districts."

(J.S. App. 40) (emphasis and alternations in original).

Still another state representative testified that "the only issue presented us was a racial issue" and stated that District 4 was created "for the sole purpose of making sure that an additional black district got created regardless of what it looked like and what parishes it ran through . . . ." (J.S. App. 40-41).

These admissions of racial gerrymandering continued at the second hearing. Several witnesses testified that the Legislature had specifically intended to sort voters on the basis of race and race alone. Witnesses testified that race was the "major element" and the "primary determiant" of the districting scheme. (J.S. App. 41). In short, "[n]ot one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering—not one." (J.S. App. 41). The district court, therefore, correctly concluded that "the *direct evidence* that Act 42 was a product of racial gerrymandering is overwhelming." (J.S. App. 43) (emphasis in original).

The court below properly found two independent evidentiary bases to support the finding that Act 42 is the product of racial gerrymandering. As the court correctly concluded, each of these basis "is sufficient on its own to

subject Act 42 to strict scrutiny, and each is consequently sufficient to require Defendants to demonstrate that Act 42 is 'narrowly tailored to further a compelling governmental interest,' as required by *Shaw* and other applicable Equal Protection Clause precedents." (J.S. App. 43).

In other words, this case has everything present in *Shaw* *plus* clear direct evidence and admissions of racial gerrymandering. Or to put it another way, this case is like *Gomillion* with the additional proof of express admissions from every witness that the bizarrely shaped district was, purposely, a racial gerrymander.

D. Appellants Presented No Convincing Evidence To Refute the Conclusion That Louisiana's Congressional Districting Plan Is a Racial Gerrymandering

At the two hearings, appellants mounted only a meager attempt to justify the districting plan as anything other than a racial gerrymander. As stated, every witness at the first hearing candidly admitted that race was the driving, and only, force behind the plan. At the second hearing, which followed closely on the heels of *Shaw*, appellants feebly advanced two post hoc, non-racial rationalizations: partisan/incumbent politics and socioeconomic commonalities. After considering these newly discovered rationales, the district court rejected them both, branding them "wholly unconvincing and in many respects disingenuous." (J.S. App. 26). In the district court's view, appellants presented "no credible evidence supporting" these alleged motivations. (J.S. App. 32). The district court, therefore, properly held that such concerns played no cognizable role in the racial gerrymandering of Louisiana's districts.[4]

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[4] The three-judge court went on to address the issue whether the result in the case would be different if partisan politics had played *any* cognizable role in the creation of a racially gerrymandered district "without for a moment granting that" such

The district court also addressed appellants' only evidence regarding compliance with traditional districting principles, namely, testimony by an expert that District 4, which appears to violate every traditional districting principle, actually possesses "socioeconomic commonality." (J.S. App. 36). However, even appellants admitted at trial that such data was not *actually* considered by the Legislature in drawing District 4. In any event, the court found appellants' argument to be no more than a post hoc rationalization.[5] Specifically, the court held that "the allegedly distinctive socioeconomic profile of District 4 is factually unconvincing, methodologically flawed, irrelevant, and unquestionably a hindsight rationalization of a plan that everyone understands to have been principally designed to create two majority-black districts." (J.S. App. 38).

After its thorough analysis of all the evidence, the district court set forth its unequivocal conclusion:

> As we find that the *only sensible* explanation for the Plan's extreme facial irregularity and its flagrant deviation from traditional districting criteria is that

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political motives were at work with respect to District 4. (J.S. App. 33). The court, however, specifically stated that its discussion of the issue was dicta, and did not in any way affect its holding in the case:

> The Defendants seem to believe that they can defeat a claim of racial gerrymandering under *Shaw*, if *any* factor other than race played *any* cognizable role in the creation of a challenged redistricting plan. Although we need not correct such a misconstruction of *Shaw* to find racial gerrymandering in this case, we briefly address this legal issue—*obiter dictum*—in hopes of shedding a little additional light on this difficult area of the law.

(J.S. App. 34) (emphasis in original). The court concluded, in dicta, that "accurately stated, the question posed by *Shaw* is whether a redistricting plan can be reasonably conceived as the product of non-racial factors. In this case the Plan cannot." (J.S. App. 35).

[5] As the court noted, "[a]ny able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district." (J.S. App. 36).

> the Legislature intentionally segregated voters into congressional districts based on their race, we conclude that the Plaintiffs have *overwhelmingly satisfied their burden of proving racial gerrymandering.*

(J.S. App. 26-27) (emphasis added).

III. LOUISIANA'S DISTRICTING PLAN IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST, AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSE

Once plaintiffs met their initial burden of proving that the districting scheme was a racial gerrymander, the district court proceeded to determine whether the plan, despite its questionable nature, was narrowly tailored to serve a compelling governmental interest. The district court noted the rationales advanced by appellants as "compelling interests," but found it unnecessary to analyze these proffered justifications in detail. The district court explained: "As we conclude, however, that Act 42 is not narrowly tailored to further these or any other compelling state interests, we need not decide here whether any one or more of them—properly clarified—is such an interest." (J.S. App. 44). The court assumed, without granting, that the proffered interests were compelling, but concluded that the plan ventured far beyond the requisite precision to serve such interests.

The district court relied, in part, on an example in *Shaw* to illustrate the proper application of the "narrowly tailored" principle: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression [in the context of § 5 of the Voting Rights Act] if the state went beyond what was reasonably necessary to avoid retrogression." (J.S. App. 47) (quoting *Shaw*, 113 S.Ct. at 2831). In other words, a state must do only what is necessary to serve a compelling interest to meet the "narrowly tailored" requirement. The district court stated the principle more broadly as follows:

> [A]s voters have an equal protection right not to be segregated by their state legislatures or local governments into various voting districts on the basis of race, only a plan that segregates to no greater extent than is reasonably necessary to further a compelling governmental interest can survive constitutional scrutiny. The same can be said for a plan that supersaturates a majority-minority district, while concomitantly depleting adjacent majority-majority districts of minority voters.

(J.S. App. 48).

With regard to the Louisiana plan, the district court correctly found that it contained far more constitutionally suspect segregation than necessary to serve the State's proffered goals. The Louisiana scheme packs more black voters into District 4 than reasonably necessary to afford blacks a realistic chance to determine the outcome of elections, provided they exercise their right to vote. (J.S. App. 48). Further, the court found that the boundaries of the district violate traditional districting principles to a greater extent than reasonably necessary. (J.S. App. 48-49).

In a State where blacks constitute approximately 23 percent of the population, District 4 contains 63 percent black registered voters. "To greater or lesser degrees, all expert witnesses acknowledged—some only reluctantly under cross examination—that 63 percent black voting age population was well in excess of the percentage needed for reasonable comfort in creating a safe voting-age majority-minority district." (J.S. App. 49). In fact, the other majority-minority district created by the Louisiana plan contains 54 percent black voting age citizens, with no substantial differences in the voting patterns of the two districts. (J.S. App. 49).

The court further found that the plan's excessive disregard of traditional districting criteria and its negative effect on a plethora of third party interests provide addi-

tional support for the conclusion that the scheme is not narrowly tailored. (J.S. App. 50) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-511 (1989)); *see also United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 510-515 (1980). The court relied on settled principles in determining that "a plan is not narrowly tailored if it adversely affects more interests, if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest." (J.S. App. 57).

Indeed, the evidence at trial clearly estabished that a second black majority district could have been drawn with substantially less violence to traditional districting principles. (J.S. App. 51). In fact, one state legislator had created just such a plan. (J.S. App. 52). The district court, therefore, concluded that:

> the Plan is *not* narrowly tailored, either relatively or absolutely. This is so because it embraces considerably more racial gerrymandering—and thus more segregation—than is needed to satisfy any advanced state interest, and because the Plan unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests.

(J.S. App. 52-53).

The Louisiana plan is not only a stark racial gerrymander, it is an excessive one. As such, it is not narrowly tailored to serve a compelling state interest.

IV. APPELLANTS' JURISDICTIONAL STATEMENT OFFERS THIS COURT NO REASONS THAT WOULD PREVENT THE COURT FROM GRANTING THIS MOTION TO AFFIRM

Some of the more blatant misstatements and fallacious arguments contained in the Jurisdictional Statement call for a direct response. These are briefly addressed below.

A. The District Court *Did Not* Hold That "Race Could *Never* Be Considered in Redistricting"

Appellants argue that the district court held that there could never by *any* consideration of race in redistricting. (J.S. 9). Not so. At the very beginning of its opinion, the district court states as follows:

> In simplest form, this case poses the question, "Does a state have the *right* to create a racial majority-minority congressional district by racial gerrymandering?" In simplest form, the answer—largely supplied by the United States Supreme Court's opinion in *Shaw v. Reno*, rendered during the pendency of this case—is "Yes, but only if the state does it right."

(J.S. App. 4) (emphasis in original).

Manifestly, the district court recognized a State's legal ability to consider race in districting and even to engage in racial gerrymandering under certain conditions. The court further stated that "*defacto* or accidental segregation is not constitutionally suspect . . . ." (J.S. App. 12, n.13). The court recognized, as stated in *Shaw*, that "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw*, 113 S.Ct. at 2826. District lines, moreover, may be drawn "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Id.* at 2826. Such districts have legitimate purposes, and are not the product of intentional, and therefore constitutionally suspect, racial gerrymandering.

This Court's voting rights jurisprudence, including *Shaw*, establishes that districts that are the product of *intentional* racial segregation are subject to strict scrutiny. Such racial gerrymanders are not absolutely prohibited, but must be narrowly tailored to serve a compelling state interest. Louisiana's bold racial gerrymander is not nar-

rowly tailored. Therefore, it flouts equal protection principles.

B. The District Court's Decision *Is Not* "a Collateral Attack on a Preclearance Decision Made by the Attorney General Pursuant to § 5 of the Voting Rights Act"

Appellants advance the argument that the district court's opinion somehow represents a "collateral attack" on a preclearance decision of the Attorney General. (J.S. 16). This argument is meritless. It mischaracterizes the district court's opinion and mistakenly conflates cases dealing with preclearance of districts under the "nonretrogression" standard of § 5 of the Voting Rights Act with cases addressing constitutional challenges to enacted districting schemes. Had they looked more closely, appellants would have found an unfavorable response to this argument in *Shaw* itself.

There, this Court specifically addressed the issue as follows:

> [O]n remand North Carolina might claim that it adopted the revised plan in order to comply with the § 5 "nonretrogression" principle. Under that principle, a proposed voting change canont be precleared if it will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 47 L.Ed.2d 629 (1976). In *Beer*, we held that a reapportionment plan that created one majority-minority district where none existed before passed muster under § 5 because it improved the position of racial minorities . . . .
>
> Although the Court concluded that the redistricting scheme at issue in *Beer* was nonretrogressive, it did hold that the plan, for that reason, was immune from constitutional challenge.

Shaw, 113 S.Ct. at 2830-31. This Court was unequivocal in *Shaw:* "Indeed, the Voting Rights Act and our case

law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional." *Id.* "[C]overed jurisdictions [do not have] *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Id.*

This case represents a constitutional challenge to a districting scheme; it is not, nor does the district court understand it to be, a challenge to the Attorney General's decisions (1) denying preclearance to the first plan proposed by the Louisiana Legislature, or (2) granting preclearance to Act 42.[6] Appellants seek to blur the clear analytical distinction between § 5 cases on the one hand, and constitutional challenges to voting districts on the other. It is axiomatic that the Attorney General's preclearance of a plan under the somewhat less rigorous "nonretrogression" analysis of § 5 does not insulate the plan from constitutional challenges mounted by citizens whose rights are violated.

C. The District Court *Did Not* Decide That "Predominantly Non-White Districts May Not Constitutionally Exceed 55 Percent Non-White Voters"

Perhaps the most disingenuous mischaracterization in the Jurisdictional Statement is the suggestion that the district court held that the Constitution prevents majority-minority districts from exceeding 55 percent non-white voters. (J.S. 21). This is wrong.

First, District 4 contains 63 percent black voting age citizens. Appellants attempt to blur this statistic by presenting their own misleading statistics agglomerating per-

[6] Appellants seize on a discussion of the Attorney General's actions in this case placed in a footnote by the district court and clearly irrelevant to the district court's ultimate decision. The district court merely expressed its opinion that the Attorney General's Office had greatly overstepped its bounds in this case. But these actions, in any event, are irrelevant to the district court's ultimate disposition of the *constitutional* challenge to Louisiana's districts in this case.

centages of *both* black and Hispanic voting age populations in carefully selected districts.

Second, and more importantly, the three-judge court held only that this plan, in these circumstances and given all of its distinguishing features, is not narrowly tailored to serve a compelling governmental interest. In its analysis, the court considered the fact that in this case, 63 percent represents considerably more racial segregation than necessary to achieve the state's proffered interests. But the district court expressly stated that "it is not the province of this court in this case to establish the demographic specifications of the State's Congressional redistricting plan." (J.S. App. 50).

Far from establishing some sort of "55 percent" bright-line rule, as appellants contend, the district court expressly renounced such bright line rules. It merely held that, on the basis of the entire factual record, 63 percent is too much racial segregation to pass muster under the Equal Protection Clause. The court placed special emphasis on the fact that the other "safe" minority district in Act 42 had precisely the same voting patterns as District 4, but a 54 percent black voting age population. (J.S. App. 17).

D. The District Court *Did Not* "Forbid Consideration of Traditional Districting Criteria Other Than Compactness in Creating Non-White Districts"

Contrary to appellants' fanciful characterizations, the district court did not "forbid" consideration of traditional districting criteria (other than compactness) in creating non-white districts. (J.S. 25). On the contrary, the district court specifically considered every traditional districting criterion in its analysis of the Louisiana plan. *See infra* pp. 12-14; (J.S. App. 28-32).

E. Appellees Hav Standing To Challenge Act 42

Seemingly as an afterthought, appellants toss in a standing objection (J.S. 27). This will not fly.

Louisiana's districting plan violates the rights of all its voters, and the Equal Protection Clause is available to all voters, regardless of race. Indeed, it is well settled that "equal protection analysis is not dependent on the race of those benefitted or burdened by a particular classification." (J.S. App. 7-8) (quoting *Shaw*, 113 S.Ct. at 2829) (citations omitted). Appellants seem to be under the misapprehension that appellees are all white. In fact, although it should not matter, the four appellees are members of three different races. In any event, *Shaw* specifically rejects the notion that voters of certain races may not state a claim under the Equal Protection Clause. *Shaw*, 113 S.Ct. at 2824, 2830 (noting that nothing precludes "white voters (or voters of any other race) from bringing the . . . claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification").

CONCLUSION

"Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* (citations omitted). In *Shaw* as in preceding cases, this Court held that this foundational principle extends into the voting booth. The *Shaw* Court spoke emphatically and powerfully about the dangers of racial gerrymanders:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth

> and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Id. at 2832. In other words, racial gerrymandering of Congressional districts is not a cure at all, but simply more of the disease.

The 1994 Congressional elections approach swiftly, and with them looms a constitutional crisis in Louisiana. To avert such a crisis and to ensure the protection of the constitutional rights of all Louisiana citizens, this Court should promptly consider and resolve this case.

There can, we believe, only be one result in view of the uncontroverted facts of this case and the existing law. The district court properly applied the *Shaw* decision to this case. The judgment of the district court should be affirmed.

Respectfully submitted,

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